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3 UNITED STATES DISTRICT COURT  
4 WESTERN DISTRICT OF WASHINGTON  
5 AT TACOMA

6 AMBERLEE HARMON,

7 Plaintiff,

8 v.

9 NEW YORK LIFE INSURANCE AND  
10 ANNUITY CORPORATION,

11 Defendant/Third-  
Party Plaintiff,

12 THOMAS E. MILLIER; DEANNA  
13 ASBELL; and TRACEY HARPER,

14 Third-Party  
15 Defendants.

CASE NO. C11-5481BHS

ORDER GRANTING IN PART  
AND DENYING IN PART  
DEFENDANT’S MOTION

16 This matter comes before the Court on Defendant/Third-Party Plaintiff New York  
17 Life Insurance and Annuity Corporation’s (“NYL”) motion for leave to deposit funds and  
18 for fees and expenses (Dkt. 26). The Court has reviewed the briefs filed in support of and  
19 in opposition to the motion and the remainder of the file and hereby grants in part and  
20 denies in part the motion for the reasons stated herein.

21 **I. PROCEDURAL HISTORY**

22 On June 6, 2011, Plaintiff Amberlee Harmon (“Harmon”) filed a complaint against  
23 NYL in the Superior Court of Washington, in and for Kitsap County. Dkt. 2, Declaration  
24 of Tim Wacherbarth, Exh. A. Harmon alleges that she is the beneficiary of an annuity  
25 held by NYL and that NYL has failed to pay her claim for the proceeds of that annuity.  
26

27 *Id.*

1 On June 22, 2011, NYL removed the matter to this Court. Dkt. 1. On July 12,  
2 2011, NYL answered the complaint and filed a Third-Party Complaint against Third-  
3 Party Defendants Tracy Harper, Deanna Asbell, and Thomas E. Millier. Dkt. 9.

4 On November 22, 2011, NYL filed the motion for leave to deposit funds and for  
5 fees and expenses. Dkt. 26. On December 1, 2011, Harmon responded. Dkt. 29. Third-  
6 Party Plaintiffs did not respond. On December 9, 2011, NYL replied. Dkt. 30.

## 7 **II. FACTUAL BACKGROUND**

8 On August 16, 2005, NYL issued lifetime income annuity policy number  
9 75600744 (the "Annuity") to Gary B. Millier. The Annuity was issued with a premium  
10 amount of \$151,076.81. Mr. Millier named Harmon, and third-party defendants, Thomas  
11 E. Millier, Deanna Asbell and Tracy Harper, as co-beneficiaries with equal 25% shares of  
12 the proceeds under the Annuity.

13  
14 On October 2, 2006, NYL received a request to change Mr. Millier's address to  
15 Harmon's home address and to also update the beneficiaries listed on the subject Annuity  
16 to make Harmon the sole and 100% beneficiary. NYL informed Mr. Millier that it was  
17 unable to honor the request, as the signature of the address and beneficiary change request  
18 did not match the signature on Mr. Millier's application for Annuity and the driver's  
19 license NYL had on record.

20 On December 14, 2009, Mr. Millier died. NYL continued to issue monthly  
21 annuity checks to Mr. Millier at the address listed in NYL's records. For approximately  
22 one year, those annuity checks were endorsed and cashed by someone purporting to be  
23 Mr. Millier.

24 Harmon claims that on December 7, 2010, her attorney sent a letter to NYL  
25 requesting the proceeds of the Annuity as the sole beneficiary. Harmon asserts that NYL  
26 did not respond. Harmon's attorney subsequently sent two more letters requesting a  
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1 disbursement of the proceeds. NYL failed to respond to the letters and Harmon filed the  
2 action in state court.

3 NYL claims that the beneficiaries were not properly changed by Mr. Millier and  
4 that the other beneficiaries, the Third-Party Defendants, have not made official claims  
5 for their portion of the proceeds.

### 6 **III. DISCUSSION**

#### 7 **A. Motion to Deposit Funds**

8 As a threshold matter, the Court may consider a party's failure to respond to a  
9 motion as an admission that the motion has merit. Local Rule CR 7(b)(2). In this case,  
10 no party responded to NYL's motion to deposit the funds of the Annuity into the Court's  
11 registry. Harmon asserted that it would be just as easy to disperse the funds to the  
12 beneficiaries, but did not object to NYL's desire to deposit the funds with the Court.  
13 Therefore, the Court will consider the parties' failure to respond as an admission that  
14 NYL's motion has merit.

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16 If the relief sought is the disposition of a sum of money, a party, on notice to every  
17 other party and by leave of court, may deposit with the court that particular sum of  
18 money. Fed. R. Civ. P. 67(a). In this case, Harmon seeks, in part, the proceeds of the  
19 Annuity and NYL has given notice to every party in the action of its intent to deposit the  
20 funds with the Court. Therefore, with no objection being filed, the Court grants NYL  
21 leave to deposit the proceeds of the Annuity with the Court. NYL claims that the  
22 proceeds amount to \$71,705.22 plus interest. Dkt. 26 at 4.

#### 23 **B. Motion for Fees and Costs**

24 A district court may award attorney's fees and costs to a plaintiff-in-interpleader.  
25 *Schirmer Stevedoring Co. Ltd. v. Seaboard Stevedoring Corp.*, 306 F.2d 188, 193 (9th  
26 Cir.1962). Whether to award fees and costs is within the discretion of the district court.  
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1 *San Rafael Compania Naviera, S.A. v. Am. Smelting & Refining Co.*, 327 F.2d 581, 587  
2 (9th Cir. 1964).

3 In this case, NYL requests that the Court award it attorney's fees and costs that it  
4 has incurred in the prosecution of this action. Dkt. 26 at 4-6. NYL, however, has failed  
5 to persuade the Court that this action was necessary in the first place. Harmon asserts that  
6 she made multiple requests for the Annuity proceeds over the course of several months  
7 with no response from NYL. Only then, she asserts, was she forced to file an action for  
8 the proceeds as well as for violations of Washington's Insurance Fair Conduct Act and  
9 related regulations. Moreover, while there may have originally been a dispute as to the  
10 proper beneficiaries, the parties are now in agreement as to the proper beneficiaries and  
11 the proper disbursement. The Court is not persuaded that NYL feared multiple lawsuits  
12 when it failed to promptly respond to a claimant and when the beneficiaries are in  
13 agreement as to the relevant aspects of the situation. Therefore, the Court denies NYL's  
14 motion for attorney's fees and costs.  
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#### 16 IV. ORDER

17 Therefore, it is hereby **ORDERED** that NYL's motion for leave to deposit funds  
18 and for fees and expenses (Dkt. 26) is **GRANTED in part** and **DENIED in part** as  
19 stated herein.

20 DATED this 19th day of December, 2011.

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23 BENJAMIN H. SETTLE  
24 United States District Judge  
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